

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

1933 May 9

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TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1932

No. 5781

261

**STETTINER CHAMOTTE FABRIK AKTIENGESELL-
SCHAFT, APPELLANT,**

vs.

**HOWARD SUTHERLAND, AS ALIEN PROPERTY
CUSTODIAN OF THE UNITED STATES, AND
WALTER O. WOODS, AS TREASURER OF THE
UNITED STATES.**

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

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Court of Appeals of the District of Columbia

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SCHAFT, APPELLANT,

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY
CUSTODIAN OF THE UNITED STATES, AND
WALTER O. WOODS, AS TREASURER OF THE
UNITED STATES, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5781.

STETTINER CHAMOTTE FABRIK AKTIENGESELLSCHAFT,
Appellant,

vs.

HOWARD SUTHERLAND, as Alien Property Custodian of the
United States, and Walter O. Woods, as Treasurer of the
United States.

a Supreme Court of the District of Columbia.

At Law.

No. 51184.

STETTINER CHAMOTTE FABRIK AKTIEN-GESELLSCHAFT,
Plaintiff,

vs.

HOWARD SUTHERLAND, as Alien Property Custodian of the
United States, and Walter O. Woods, as Treasurer of the
United States, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1—5781*a*

1 *Bill of Complaint.*

Filed Mar. 21, 1930.

In the Supreme Court of the District of Columbia, Holding
Equity Court.

In Equity.

No. 51184.

STETTINER CHAMOTTE FABRIK AKTIEN-GESELLSCHAFT,,
Plaintiff,

v.

HOWARD SUTHERLAND, as Alien Property Custodian of the
United States, and Walter O. Woods, as Treasurer of the
United States, Defendants.

To the Supreme Court of the District of Columbia:

1. The plaintiff Stettiner Chamotte Fabrik Aktien-Gesellschaft is a corporation organized and existing under and by virtue of the laws of Germany with its principal office and place of business at Stettin, Germany, and brings this suit in its own right and alleges:

2. The defendants Howard Sutherland, Alien Property Custodian, and Walter O. Woods, Treasurer of the United States, are both residents of the District of Columbia, and are sued in their official capacity.

3. The plaintiff and another German corporation known as Deutsche-Ton & Steinzeug Werke A. G., hereinafter referred to as Deutsche-Ton, were prior to May 16, 1912 the owners of all of the capital stock of Didier-March Company, a corporation organized under the laws of the State of New Jersey. On May 16, 1912, said Didier-March Company entered into an agreement with Deutsche-Ton wherein it agreed to pay the said last named company for each and every consecutive year thereafter commencing with
2 January 1, 1912 for a period of ten years, 15 per cent of the earnings of said Didier-March Company after "the actual capital invested by Didier-March Company shall have earned 5 per cent interest per annum," the said share of the earnings to be accounted for on or before May

15th of each succeeding year. Contemporaneously with this agreement, the plaintiff acquired all of the stock of Didier-March Company previously owned by Deutsche-Ton so that plaintiff thereafter became and was the sole stockholder of Didier-March Company.

4. Subsequent to the declaration of war between the United States and Germany and the taking effect of that certain Act of Congress known as "Trading with the Enemy Act" and the appointment of the Alien Property Custodian under and pursuant thereto, and prior to the termination of the war between the United States and Germany, the then Alien Property Custodian determined after investigation that the plaintiff was an enemy within the purview of said statute and pursuant thereto duly seized all of the right, title and interest of the plaintiff in the aforesaid Didier-March Company, including the plant and property thereof, the capital stock, and the rights and interest of every nature.

5. Thereafter in the year 1921 the Didier-March Company was liquidated by the then Alien Property Custodian and the proceeds thereof deposited in an account known as Trust No. 11866 in favor of Stettiner Chamotte Fabrik A. G.

6. In the year 1923 Deutsche-Ton filed a claim with the then Alien Property Custodian for amounts representing earnings supposed to have been accrued to it from Didier-March Company under the aforesaid contract of May 16, 1912. Plaintiff is advised and believes and therefore avers that the then Alien Property Custodian without notice to this plaintiff, made a determination that the sum accruing to said Deutsche-Ton for the years 1917, 1918 and 1919 aggregated the sum of \$23,369.38, and thereafter the said Alien Property Custodian at some date unknown to plaintiff and without notice to said plaintiff, caused said amount of \$23,369.38, plus interest and accruals, to be transferred from Trust No. 11866 which contained the proceeds of the liquidation of the said Didier-March Company as aforesaid, to a trust in favor of Deutsche-Ton known as Trust No. 32429.

7. Plaintiff is informed and believes and therefore alleges that the Alien Property Custodian has allowed certain claims and made certain payments to said Deutsche-Ton out of the funds so transferred as aforesaid, and that said

Deutsche-Ton has presented and is prosecuting other claims for the return of 80 per cent of the amount of said alleged earnings under the contract of May 16, 1912.

8. Plaintiff alleges that there is not in fact any amount due to said Deutsche-Ton under the contract between that company and Didier-March Company dated May 16, 1912, for the reason that there was no amount of earnings derived by said Didier-March Company during the years 1917, 1918 and 1919 or any other year in excess of an earning of 5 per per cent interest on actual capital invested in said Didier-March Company as by the contract of May 16, 1912 provided; and plaintiff further avers that the action of the Alien Property Custodian in transferring the proceeds derived from the liquidation of said Didier-March Company to a trust in favor of Deutsche-Ton was erroneous and illegal and should be reversed, and the sums heretofore transferred should be restored to Trust No. 11866 for the reason that the same are the property of this plaintiff.

9. In February 1929 plaintiff duly filed a claim with the Alien Property Custodian for the return to it of the funds transferred to the aforesaid Trust No. 32429 in favor of Deutsche-Ton which the plaintiff avers was erroneously transferred to said trust, and for the payment to it of said sum and any additions and accretions thereto and income therefrom still held by the Alien Property Custodian and/or the Treasurer of the United States; that plaintiff has complied with all of the other requirements of the statute and of regulations issued thereunder in connection with its said claims and has done all things required of it as a condition precedent to the allowance of its said claim and the release and payment over of the monies belonging to it and collected by the Alien Property Custodian as hereinabove stated, together with the additions and accretions thereto and the income therefrom. Notwithstanding this, the Alien Property Custodian and the Treasurer of the United States have failed and refused and still refuse to allow said claim and/or release, return and pay over to plaintiff the aforesaid sum transferred to and held in Trust No. 32429 in favor of said Deutsche-Ton to which the plaintiff is entitled by reason of the premises:

Wherefore plaintiff prays for relief as follows: to wit

1. That process issue and be served upon the defendants and each of them requiring them to appear and make answer

thereto but not under oath, answer under oath being expressly waived.

2. That it be decreed that plaintiff is entitled to have released and paid over to it the fund received by the Alien Property Custodian and transferred to Trust No. 32429, being the alleged accruals of income to said Deutsche-Ton as hereinabove set forth with the additions and accretions thereto and income therefrom less the sum required to be retained by the provisions of subsection M of section 9 of "Trading with the Enemy Act" as amended.

3. That the defendants, the Alien Property Custodian and the Treasurer of the United States be required to account to plaintiff for the sum or sums collected and received from Didier-March Company and for the said sums which have been transferred to Trust No. 32429 hereinbefore mentioned and referred to.

4. That plaintiff have all other and further relief to which in the premises it may be entitled.

COLLADAY, CLIFFORD & PETTUS,
B. B. PETTUS,

Attorneys for Plaintiff.

STATE OF NEW YORK,

County of New York, ss:

Stuart McNamara, being duly sworn, deposes and says he is attorney-in-fact for Stettiner Chamotte Fabrik Aktien-Gesellschaft, the plaintiff named in the foregoing bill of complaint by virtue of power of attorney duly filed with the Alien Property Custodian; that he has read the foregoing bill of complaint and knows the contents thereof, and verily believes the matters and things therein stated to be true and therein set forth.

STUART McNAMARA.

Subscribed and sworn to before me this 19th day of March, 1930.

[NOTARIAL SEAL.]

R. D. McGURK,
Notary Public.

R. D. McGurk, Notary Public, Nassau County.
N. Y. Co. Cl'k's No. 413, Reg. No. 1Mc41A.
Commission expires March 30, 1931.

6 *Answer to the Bill of Complaint.*

Filed Jun. 13, 1930.

* * * * *

Now come the defendants, Howard Sutherland, as Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States, separately and severally, and for their separate and several answers to the bill of complaint, say:

I. That the plaintiff has not stated sufficient facts in its bill of complaint to constitute a cause of action.

II. That under the provisions of Section 9 of the Trading with the Enemy Act and the amendments thereto this Court has no jurisdiction of the subject matter of the bill of complaint, and has no jurisdiction to hear and determine or to grant any relief in respect of the matters complained of in said bill of complaint.

III. That the plaintiff has not stated sufficient facts to show that this Court has jurisdiction.

And now, not waiving the many defects and insufficiencies of the bill of complaint, but specifically insisting upon each of the objections thereto as hereinbefore set forth, these defendants, for their separate and several answers to the bill of complaint, separately and severally, say:

1. Upon information and belief the defendants admit the allegations contained in paragraph numbered 1 of the bill of complaint.

2. Answering the averments contained in paragraph numbered 2 of the bill of complaint the defendants admit that Howard Sutherland is the Alien Property Custodian of the United States and is a resident of the State of West Virginia, and that Walter O. Woods is the Treasurer of the United States and is a resident of the State of
7 Kansas, and that each is sued in his official capacity.

3. Upon information and belief the defendants admit the allegations contained in paragraph numbered 3 of the bill of complaint. There is attached hereto and made a part hereof what purports to be and which these defendants believe to be a copy of the contract referred to in paragraph numbered 3 of the bill of complaint, which is marked Exhibit "A". The defendants are informed and

believe that this contract remained in full force and effect from May 16, 1912, until after the happening of the matters and things hereinafter stated.

4. Answering the averments contained in paragraph numbered 4 of the bill of complaint the defendants admit that after the declaration of war between the United States and Germany and subsequent to the enactment of the Trading with the Enemy Act and during the period of said war the Alien Property Custodian after investigation determined that the plaintiff was an enemy not holding a license granted by the President and that said plaintiff was the owner of the entire capital stock of the Didier-March Company, a corporation of the State of New Jersey, and thereupon seized said entire capital stock as the property of the plaintiff. Upon information and belief the defendants deny that the Custodian seized the plant and physical property of the Didier-March Company as said property belonged to said Didier-March Company, a New Jersey corporation.

5. Answering the averments contained in paragraph numbered 5 of the bill of complaint the defendants say that after the seizure of the entire stock of the Didier-March Company the assets of that corporation were liquidated and the company was dissolved. The proceeds received upon liquidation were paid over to the Alien Property Custodian and by him deposited in the Treasury of
8 the United States in Trust No. 11,866 in the name of said Stettiner Chamotte Fabrik A. G., the plaintiff herein. Before the dissolution of the corporation Whittesley, Wythes & Wilson, Certified Public Accountants, were employed by the Didier-March Company to make an audit of its accounts and determine the amount of the indebtedness due by said Didier-March Company to the Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft because of the participation of said Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft in the earnings of the Didier-March Company under the aforesaid contract referred to in Paragraph numbered 3 of the bill of complaint, and said certified public accountants determined that the total amount due the Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft under said contract was \$23,369.88. Thereafter, on December 4, 1919, before the dissolution of said Didier-March Company, the directors of said Didier-

March Company approved of the report of said certified public accountants and ordered and directed that said \$23,369.88 be paid by said Didier-March Company to the Alien Property Custodian to be held by the Custodian for the benefit of the Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft. Prior to the resolution of the Board of Directors of the Didier-March Company to pay over said sum of \$23,369.88 to the Alien Property Custodian and during the period of the recent war between the United States and Germany the Custodian duly seized all right, title and interest of the Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft under the aforesaid contract, including all indebtedness due by the Didier-March Company to said Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft as the property of the latter. When said sum of \$23,369.88 was received by the Alien Property Custodian from the Didier-March Company he failed to place it in a separate trust in the name of the Deutsche Ton-& Steinzeug-
9 Werke Aktiengesellschaft, but erroneously placed it in Trust No. 11,866 along with the property of this plaintiff. Thereafter, on or about March 8, 1924, the Alien Property Custodian in going over the assets included in Trust No. 11,866 discovered that said sum of \$23,369.88 had erroneously been placed in said trust and thereupon on said date ordered that said sum of \$23,369.88, consisting of \$23,000.00 in United States Liberty Loan Bonds and \$369.88 in cash, be transferred from Trust No. 11,866 in the name of this plaintiff, to Trust No. 32,429 in the name of the Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft, and pursuant to the order of the Alien Property Custodian said sum of \$23,369.88 was thereupon duly transferred from Trust No. 11,866 to Trust No. 32,429 in the name of said Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft.

6. Answering the averments contained in paragraph numbered 6 of the bill of complaint the defendants say that on or about August 4, 1923, the Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft filed a claim with the Alien Property Custodian for the recovery under the Winslow Amendment to the Trading with the Enemy Act of March 4, 1923 of \$10,000.00 of the \$23,369.88, which constitutes the amount due the Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft under the aforesaid contract of May 16,

1912, and which was seized by the Custodian during the period of the war, and for further answer to the averments contained in paragraph numbered 6 these defendants respectfully refer to their answer to paragraph numbered 5 hereof.

7. The defendants admit the allegations contained in paragraph numbered 7 of the bill of complaint. The Alien Property Custodian has returned to the Deutsche Ton- & Steinzeug-Werke Aktiengesellschaft the sum of \$10,000.00 of said \$23,369.88 and said Deutsche Ton- & Steinzeug-Werke Aktiengesellschaft has instituted a
10 suit in this court against the Treasurer of the United States and the Alien Property Custodian entitled Deutsche Ton- & Steinzeug-Werke Aktiengesellschaft v. Woods, et al., Equity No. 50,555, in which said Deutsche Ton- & Steinzeug-Werke Aktiengesellschaft seeks to recover 80 per cent. of the balance of said \$23,369.88 now held by these defendants.

8. The defendants deny the allegations contained in paragraph numbered 8 of the bill of complaint.

9. The defendants deny the allegation contained in paragraph numbered 9 of the bill of complaint that there was an erroneous transfer of funds by the Custodian to Trust No. 32,429, and deny that the plaintiff is entitled to recover any of the funds transferred to said Trust No. 32,429, and admit the other allegations contained in said paragraph.

Wherefore the defendants, having fully answered the bill of complaint, pray that they be dismissed with their costs in this behalf expended and for such other and further relief to which in the premises they may be justly and equitably entitled.

Respectfully submitted,

HOWARD SUTHERLAND,
Alien Property Custodian.
WALTER O. WOODS,
Treasurer of the United States.

LEO A. ROVER,
*Attorney of the United States in
and for the District of Columbia;*
THOMAS E. RHODES,
*Special Assistant to
The Attorney General,
Attorneys for the Defendants.*

11-17 DISTRICT OF COLUMBIA, ss:

Howard Sutherland, being first duly sworn, upon oath, deposes and says that he is Alien Property Custodian of the United States of America, that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true, and those stated as upon information and belief he believes to be true.

HOWARD SUTHERLAND,
Alien Property Custodian.

Subscribed and sworn to before me this 13th day of June, 1930.

[NOTARIAL SEAL.]

SOPHIE D. HILLMAN,
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

Walter O. Woods, being first duly sworn, upon oath deposes and says that he is Treasurer of the United States of America; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true and those stated as upon information and belief he believes to be true.

WALTER O. WOODS,
Treasurer of the United States.

Subscribed and sworn to before me this 13th day of June, 1930.

[NOTARIAL SEAL.]

ELLA F. VAN ZANDT,
Notary Public, D. C.

* * * * *

18

Order.

Filed Nov. 17, 1930.

* * * * *

Upon consideration of the motion filed by the defendants Howard Sutherland as Alien Property Custodian and Walter O. Woods as Treasurer of the United States to dismiss the bill of complaint filed by the plaintiff herein on the

grounds that it fails to state sufficient facts to constitute a cause of action and that this Court has no jurisdiction of the subject matter therein contained, and the Court 19-63 being fully advised in the premises, it is by the Court this 17th day of November, 1930,

Ordered:

That said motion be and the same is hereby denied without prejudice to the defendants.

JOSEPH W. COX,
Justice.

I consent as to form.

THOMAS E. RHODES,

Attorney for Defendants.

COLLADAY, McGARRAGHY, PETTUS &
WALLACE,

Attys. for Stettiner

Chamotte Fabrik A. G.

* * * * *

64

Finding of Facts.

Filed June 24, 1932.

* * * * *

The Court makes and files the following finding of facts and conclusions of law:

Finding of Facts.

This cause having been consolidated for a hearing 65 with the cause of *Deutsche Ton & Steinzeug-Werke A. G. v. Howard Sutherland, as Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States*, Equity No. 50555, came on to be heard at this term on the merits with said Equity cause No. 50555 upon the pleadings in said two causes and the agreed statement of facts, together with the exhibits attached thereto, stipulated and agreed by and between all the parties to said two causes, and the Court makes the following finding of facts:

1. The plaintiff in Equity cause No. 50555, *Deutsche Ton and Steinzeug-Werke A. G.* (hereinafter referred to as

“Deutsche Ton”), is now and during all of the time hereinafter mentioned was a corporation organized and existing under the laws of Germany with its principal office and place of business in the City of Charlottenburg, Germany.

2. The plaintiff in Equity cause No. 51184, Stettiner Chamotte Fabrik A. G. (hereinafter referred to as “Stettiner”), is now and during all of the times hereinafter mentioned was a corporation organized and existing under the laws of Germany with its principal place of business in the City of Stettin, Germany.

3. Defendant Howard Sutherland is the duly appointed and acting Alien Property Custodian and defendant Walter O. Woods is the duly appointed and acting Treasurer of the United States.

4. Didier-March Company was a corporation organized under the laws of the State of New Jersey in the year 1906. From the year 1912 until the seizure hereinafter mentioned all of its shares of issued and outstanding capital stock were owned by the above named Stettiner; and from and after December 31, 1916 the par value of its issued and outstanding capital stock amounted to the sum of \$1,150,000.

66 5. On or about May 16, 1912 Didier-March Company entered into an agreement in writing with Deutsche Ton which among other things provided that during a period of ten years commencing January 1, 1912 there should be paid by Didier-March Company to Deutsche Ton for each and every consecutive year fifteen per cent of the earnings of Didier-March Company after the actual capital invested by Didier-March Company should have earned five per cent interest per annum, the share of the earnings of Didier-March Company to be accounted for and paid for to Deutsche Ton on or before the 15th day of May of each succeeding year. Said contract continued to be and remain in full force and effect until after the happening of the matters and things hereinafter stated.

6. On or about March 27, 1918 the then acting Alien Property Custodian under and pursuant to the power vested in him by law after investigation duly determined that Stettiner was an enemy within the meaning of the Trading with the Enemy Act not holding a license granted by the President, that it was the owner of all the outstanding shares of capital stock of Didier-March Company and

by demand duly served upon Didier-March Company on April 10, 1918 seized all of said shares of stock and all the rights, title and interest of said enemy in and to such shares. At that time said Alien Property Custodian set up an account upon his records designated as Trust No. 11866 in the name of Stettiner to which account or trust there was to be credited and in which account or trust there was to be held all money and property seized by him as the property of Stettiner and all proceeds therefrom and income thereon and increment thereto. Subsequent to the seizure
67 the Alien Property Custodian caused all of said shares of stock to be transferred on the books of Didier-March Company to him and new certificates issued in his name as Custodian, with the exception of five shares of common stock which from time to time by direction of the Alien Property Custodian were transferred to and issued in the name of persons acting as directors of Didier-March Company.

7. At a meeting of the Board of Directors of the Didier-March Company duly held and convened on the 15th day of April, 1918 at which there were present the whole board of three directors, one of the directors resigned and another person designated by the Alien Property Custodian was elected in his place, and thereafter the number of directors was increased from three to five and two more persons designated by the Alien Property Custodian were duly elected and qualified. Thereafter on the 28th day of May, 1918 at a meeting of the board duly held another of the directors in office on April 15, 1918 resigned and another person designated by the Alien Property Custodian was elected in his place. At a meeting of the stockholders held on March 12, 1919 five persons designated by the Alien Property Custodian were elected directors.

8. The Didier-March Company, notwithstanding the seizure of all of its issued and outstanding shares of capital stock and designation by the Alien Property Custodian of persons to act as directors of that corporation, continued to exist and to be managed and administered as a corporation organized and existing under the laws of the State of New Jersey.

9. On November 22, 1918 the directors of Didier-
68 March Company passed a resolution instructing its counsel to file a supplemental report with the Alien

Property Custodian to report the discovery of the obligation of Didier-March Company under the above-mentioned contract of May 16, 1912 to Deutsche Ton.

10. Pursuant to said resolution on December 2, 1918 the Didier-March Company did report the existence of the contract of May 16, 1912 to the Alien Property Custodian and the Custodian determining after investigation that Deutsche Ton was an enemy within the meaning of the Trading with the Enemy Act not holding a license granted by the President and that it had a certain right, title and interest in and to the contract of May 16, 1912 by demand served on the Didier-March Company seized every right, title and interest of Deutsche Ton in and to the contract including every power and authority thereover which might or could be exercised by it. Thereafter, on January 22, 1919 the Custodian served an additional and supplemental demand upon Didier-March Company by which he seized all of the rights, privileges and benefits granted to or conferred upon said Deutsche Ton by the agreement dated May 16, 1912 between Deutsche Ton and Didier-March Company together with all payments accrued or to accrue under said agreement and required the same to be conveyed, transferred, assigned, delivered, and paid over to him. At that time said Alien Property Custodian set up an account upon his records designated as Trust No. 32429 in the name of Deutsche Ton to which account or trust there was to be credited and in which account or trust there was to be held all money and property seized by him as the property of Deutsche Ton and all proceeds there-
69 from and income thereon and increment thereto.

11. Under date of December 19, 1918 Whittlesey and Wythes, certified public accountants of New York City, rendered to the Alien Property Custodian an audit report of the books and accounts of Didier-March Company in which it was set forth that \$22,810.46 represented the sum of the participation of Deutsche Ton in the profits of Didier-March Company for 1917 and nine months of 1918.

12. The Didier-March Company, acting by and through its Board of Directors and its secretary and counsel, duly determined and agreed that the amount accruing in favor of Deutsche Ton and payable to the Alien Property Custodian by virtue of his seizure out of the earnings of said Didier-March Company for the years 1917, 1918 and 1919

under the contract of May 16, 1912, amounted to \$10,180.78 for the year 1917; \$11,848.38 for the year 1918; \$1,340.72 for the year 1919, making a total of \$23,369.88; and these amounts were accepted and agreed to by the Alien Property Custodian as the amount accruing and payable to him by Didier-March Company under the said contract of May 16, 1912.

By a resolution duly adopted by the Board of Directors of Didier-March Company on December 4, 1919 the said amount of \$23,369.88 was ordered paid to the Alien Property Custodian in Liberty Bonds at their face value.

13. Pursuant to action of the Board of Directors of Didier-March Company, approved by the Alien Property Custodian, the real estate, plant and machinery of Didier-March Company were sold on March 15, 1920 and commencing subsequent to March 9, 1921 Didier-March Company was dissolved under the laws of the State of New Jersey through the Chancery Court of said State, 70 such dissolution being completed in the year 1926.

From time to time there was transmitted to the Alien Property Custodian the proceeds of liquidation of said Company in the form of Liberty Loan Bonds and cash. On March 7, 1921 there was received by the Alien Property Custodian \$581,000.00, being checks for \$500,000.00 and Liberty Bonds of the face value of \$81,000.00.

14. On August 3, 1923 pursuant to the provisions of the Act of March 4, 1923 called the Winslow Act Deutsche Ton filed a claim for the payment to it of \$10,000.00. When this claim received consideration in the office of the Custodian his attention was called to the action of the directors of Didier-March Company ordering the payment to him in Liberty Bonds at face value of the sum of \$23,369.88 on account of the contract of May 16, 1912 and further that no separation had been made of the money and property received by him from Didier-March Company pursuant to said order of the Board of Directors. He thereupon approved a recommendation regularly made to him by certain of his assistant subordinates that \$23,369.88 be transferred from trust 11866 in the name of Stettiner to trust 32429 in the name of Deutsche Ton. On or about March 8, 1924 a transfer was made from trust 11866 in the name of Stettiner to trust 32429 in the name of Deutsche Ton of Second Liberty Loan bonds of the face value of \$23,000.00,

interest which had accrued thereon from May 15, 1920 to November 15, 1923 and cash in the sum of \$369.88.

15. Thereafter the Alien Property Custodian allowed the said claim filed by Deutsche Ton under the Winslow
71 Act and paid to its attorney in fact the sum of \$9,900.00 represented by United States Second Liberty Loan Bonds in the amount of \$9,801.00 with coupons attached and check for \$99.00. Thereafter pursuant to the provisions of said Winslow Act additional payments were made to Deutsche Ton representing interest on the bonds still retained in trust 32429 in its name in the aggregate sum of \$4,496.46.

16. Under date of December 26, 1923 Stettiner filed a claim under the provisions of the Act of March 4, 1923 called the Winslow Act which claim was allowed pursuant to the Act and there was paid to Stettiner the sum of \$9,900.00 principal and \$54,300.00 subsequently accruing interest.

17. Subsequent to the passage of the Settlement of War Claims Act of March 10, 1928 Deutsche Ton filed a claim with the Alien Property Custodian for the balance remaining in trust No. 32429 in its favor consenting to the retention by the Custodian of twenty per cent thereof as required by said Act and otherwise complying with all things required of it as a condition precedent to the allowance of its said claim and the release and payment over of the monies belonging to it together with the additions and accretions thereto and the income therefrom.

18. On February 19, 1929 Stettiner filed a similar claim under the Settlement of War Claims Act for the balance remaining in trust 11866 in its favor consenting to the retention by the Custodian of twenty per cent thereof as required by said Act and doing what is required of it as a condition precedent to the allowance of its said claim and the release and payment over of the monies belonging to it
72 and collected by the Alien Property Custodian together with the additions and accretions thereto and income therefrom.

19. The defendant Alien Property Custodian has refused to pay over to either Deutsche or Stettiner the balance of the money and property remaining in trust No. 32429 or any part thereof.

Conclusions of Law.

1. By virtue of the seizure by the Alien Property Custodian of all of the shares of the capital stock of Didier March Company issued and outstanding he became vested with and authorized to exercise all of the rights of ownership appurtenant to the said shares, including the power to exercise any and all voting rights; and by virtue of the seizure by the said Custodian of all of the rights, privileges and benefits granted to or conferred upon Deutsche Ton by the agreement dated May 16, 1912 between Deutsche Ton and Didier-March Company, he became vested with all of the rights and powers of Deutsche Ton under and in respect of said contract, including the power, without notice to or consultation with either Stettiner or Deutsche Ton, to negotiate with and agree with said Didier-March Company upon the amount accruing under said contract in favor of Deutsche Ton, and to collect and receive from Deutsche Ton any and all sums payable by Didier-March Company under said contract.

2. Neither the seizure by the Alien Property Custodian of all of the shares of capital stock of said Didier-March Company issued and outstanding, nor the seizure by the Alien Property Custodian of all of the rights, privileges and benefits granted to or conferred upon Deutsche Ton by the agreement of May 16, 1912, nor the designation
73 by the Alien Property Custodian of persons to serve as directors of said Didier-March Company effected or resulted in change in the corporate existence or identity of said Didier-March Company as a New Jersey corporation, and said corporation continued to exist, as, and to be managed and administered as a New Jersey corporation until its dissolution under the laws of the State of New Jersey through the Chancery Court of that State commencing subsequent to March 9, 1921 and being completed in the year 1926.

3. The Didier-March Company, acting through its Board of Directors and its secretary and counsel, fixed and determined upon the amount of \$23,369.88 as the amount accruing in favor of Deutsche Ton under the contract of May 16, 1912 for the years 1917, 1918 and 1919 and directed that this sum be paid to the Alien Property Custodian in Liberty Bonds at their face value; and the Alien Property Custodian duly accepted and agreed to this; and it became and

was the duty of the Alien Property Custodian to credit to trust No. 32429 in the name of Deutsche Ton out of the proceeds of liquidation of Didier-March Company received by the Alien Property Custodian, Liberty Loan Bonds of the face value or amount of \$23,000 and cash in the amount of \$369.88, together with any and all income therefrom and accretions and additions thereto.

4. The transfer as made by the Alien Property Custodian on or about March 8, 1924 from trust No. 11866 in the name of Stettiner to trust No. 32429 in the name of Deutsche Ton of Second Liberty Bonds of the face value of \$23,000, together with the interest that had accrued thereon from May 15, 1920 to November 15, 1923, and cash in the sum of \$369.88 was a ministerial or administrative act of the Alien Property Custodian which he was authorized as such official to do, and was duly and properly made by him.

5. Deutsche Ton has filed a claim with the Alien Property Custodian as required by the provisions of the act known as the Settlement of War Claims Act of 1928, and has duly complied with all of the other requirements of said statute precedent to the allowance of its claim.

6. Deutsche Ton is entitled to have released and paid over to it the balance of the money and property now held by the defendant Alien Property Custodian and/or Treasurer of the United States in a certain trust among the records of the office of the Alien Property Custodian designated No. 32429 in the name of Deutsche Ton with the additions and accretions thereto less the sum required to be retained by the provisions of sub-section M of Section 9 of the Trading with the Enemy Act and less all lawful deductions made by said defendants or either of them from said fund.

7. Stettiner did not own the sum of \$23,369.88, fixed and determined by the Didier-March Company and the Alien Property Custodian as the amount due by the Didier-March Company to the Alien Property Custodian under the afore-said contract of May 16, 1912, or any part thereof, at the time said \$23,369.88 was seized by, or paid, conveyed, transferred, assigned and delivered to the Alien Property Custodian.

8. Stettiner is not entitled to recover said \$23,369.88, or any part thereof, or any interest thereon, and Stettiner is

75 not entitled to have released and paid over to it any
of the money and/or other property held by the
Alien Property Custodian and/or the Treasurer of
the United States in Trust No. 32429 in the name of
Deutsche Ton & Steinzeug-Werke A. G.

9. It, therefore, follows as a matter of law that the bill
of complaint filed by Stettiner should be dismissed.

DANIEL W. O'DONOGHUE,

Justice.

June 24, 1932.

Final Decree.

Filed June 24, 1932.

* * * * *

This cause having been consolidated for a hearing with
the cause of *Deutsche Ton & Steinzeug-Werke A. G. v.*
Howard Sutherland, as Alien Property Custodian, and
Walter O. Woods, as Treasurer of the United States, Equity
No. 50555, came on to be heard at this term on the merits
upon the bill of complaint, the answer of the defendants,
and the agreed statement of facts stipulated by and between
the parties, together with the Exhibits attached to said
agreed statement of facts, and thereupon, upon due con-
sideration thereof, it is by the Court this the 24th day of
June, 1932,

Adjudged, ordered, and decreed that the plaintiff is en-
titled to recover nothing and that said bill of complaint be
and the same hereby is dismissed, with costs.

DANIEL W. O'DONOGHUE,

Justice.

76 From the foregoing decree the plaintiff, by its
attorneys, notes an appeal in open court to the Court
of Appeals of the District of Columbia and the same
is hereby allowed, and the undertaking for costs is hereby
fixed at \$100.00, with leave to the plaintiff to deposit the
sum of \$50.00 with the Clerk of the Court in lieu thereof.

DANIEL W. O'DONOGHUE,

Justice.

No objection as to form.

HENRY B. MORROW,

WILTON H. WALLACE,

Attorneys for the Plaintiff.

Memorandum.

July 9, 1932.—\$50.00 deposit in lieu of bond on appeal.

Assignment of Errors.

Filed July 9, 1932.

* * * * *

1. The Court erred in entering a decree dismissing the Bill of Complaint.

2. The Court erred in not entering a decree in favor of the plaintiff.

3. The Court erred in not finding all the facts as stipulated by and between counsel in the Agreed Statement of Facts filed June 3, 1932.

4. The Court erred in finding as a conclusion of law that by virtue of the seizure by the Alien Property Custodian of all of the shares of the capital stock of Didier-March Company, he became vested with and authorized to exercise all of the rights of ownership appurtenant to said shares including the power to exercise any and all voting rights; and that by virtue of the seizure by the said Custodian of all of the rights, privileges and benefits granted to or conferred upon Deutsche Ton by the agreement dated May 16, 1912 between said Deutsche Ton and said Didier-March Company, he became vested with all of the rights and powers of Deutsche Ton under and in respect of said contract, including the power, without notice to or consultation with either Stettiner or said Deutsche Ton, to negotiate with and agree with said Didier-March Company upon the amount accruing under said contract in favor of said Deutsche Ton, and to collect and receive from said Deutsche Ton any and all sums payable by said Didier-March Company under said contract.

5. The Court erred in finding as a conclusion of law that neither the seizure by the Alien Property Custodian of all of the shares of the capital stock of Didier-March Company, nor the seizure by the said Custodian of all of the rights, privileges and benefits granted to or conferred upon Deutsche Ton by the agreement of May 16, 1912, nor the designation by the said Custodian of persons to serve as directors of said Didier-March Company effected or resulted in change in the corporate existence or identity of said Didier-March Company as a New Jersey corporation

and that said Didier-March Company continued to exist, as, and to be managed as a New Jersey corporation until its dissolution.

6. The Court erred in finding as a conclusion of law that Didier-March Company, acting through its Board of
78 Directors and its secretary and counsel, fixed and determined upon the amount of \$23,369.88 as the amount accruing in favor of Deutsche Ton under the contract of May 16, 1912 for the years 1917, 1918 and 1919 and directed that this sum be paid to the said Custodian in Liberty Bonds at their face value; and that the said Custodian duly accepted and agreed to this; and that it became and was the duty of the said Custodian to credit to trust No. 32429 in the name of said Deutsche Ton out of the proceeds of liquidation of said Didier-March Company received by the said Custodian, Liberty Loan Bonds of the face value or amount of \$23,000 and cash in the amount of \$369.88, together with any and all income therefrom and accretions and additions thereto.

7. The Court erred in finding as a conclusion of law that the transfer as made by the Alien Property Custodian on or about March 8, 1924 from trust No. 11866 in the name of Stettiner to trust No. 32429 in the name of Deutsche Ton of Second Liberty Bonds of the face value of \$23,000, together with the interest that had accrued thereon from May 15, 1920 to November 15, 1923, and cash in the sum of \$369.88, was duly and properly made by him.

8. The Court erred in finding as a conclusion of law that Deutsche Ton is entitled to have released and paid over to it the balance of the money and property now held by the Alien Property Custodian and/or Treasurer of the United States in a certain trust among the records of the office of the said Custodian designated as No. 32429 in the name of said Deutsche Ton and the additions and accretions thereto less the sum required to be retained by the provisions of
sub-section M of Section 9 of the Trading with the
79 Enemy Act and less all lawful deductions made by the said Custodian and the said Treasurer of the United States or either of them from said fund.

9. The Court erred in finding as a conclusion of law that Stettiner did not own the sum of \$23,369.88, fixed and determined by Didier-March Company and the Alien Property

Custodian as the amount due by the said Didier-March Company to the Alien Property Custodian under the said contract of May 16, 1912 or any part thereof, at the time said \$23,369.88 was seized by, or paid, conveyed, transferred, assigned and delivered to the said Custodian.

10. The Court erred in finding as a conclusion of law that Stettiner is not entitled to recover said \$23,369.88 or any part thereof, or any interest thereon, and that said Stettiner is not entitled to have released and paid over to it any of the money and/or other property held by the Alien Property Custodian and/or the Treasurer of the United States in trust No. 32429 in the name of Deutsche Ton & Steinzeug-Werke, A. G.

HENRY B. MORROW,
WILTON H. WALLACE,
COLLADAY, McGARRAGHY, PETTUS &
WALLACE,

Attorneys for Plaintiff.

Receipt of a copy of the foregoing Assignment of Errors acknowledged this 9th day of July, 1932.

THOMAS E. RHODES,
Attorney for Defendants.

80

Designation of Record.

Filed July 9, 1932.

* * * * *

The Clerk will please prepare the record on appeal in the above-entitled cause and include therein the following papers and proceedings:

1. Bill of Complaint.
2. Answer of the defendants to the Bill of Complaint together with the Exhibit attached thereto.
3. Order denying motion of defendants to dismiss the Bill of Complaint.
4. Agreed Statement of Facts filed June 3, 1932, together with Exhibits attached thereto.
5. Findings of Fact and Conclusions of Law filed June 24, 1932.
6. Final Decree entered June 24, 1932 and notation of appeal in open court.

7. Assignment of Errors.

8. This Designation of Record.

HENRY B. MORROW,
WILTON H. WALLACE,
COLLADAY, MCGARRAGHY, PETTUS &
WALLACE,

Attorneys for Plaintiff.

Receipt of a copy of the foregoing Designation of Record
acknowledged this 9th day of July, 1932.

THOMAS E. RHODES,
Attorney for Defendants.

81 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 80, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51184 at Law, wherein Stettiner Chamotte Fabrik Atkien-Gesellschaft is Plaintiff and Howard Sutherland as Alien Property Custodian of the United States and Walter O. Woods as Treasurer of the United States are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of August, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,

By CHAS. B. COFLIN,
Asst. Clerk.

82 In the Court of Appeals of the District of Columbia.
No. 5781.

STETTINER CHAMOTTE FABRIK AKTIEN-GESELLSCHAFT,
Appellant,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, and
Walter O. Woods, as Treasurer of the United States,
Appellees.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled case that in the printing of the transcript Exhibit "A" to the Answer to the bill of complaint beginning on page 12 and ending on page 18, and the Agreed Statement of Facts with Exhibits "A" to "L", inclusive, beginning on page 20 and ending on page 64 be eliminated, inasmuch as these documents appear in the companion case No. 5775, and that the Appellant in case No. 5781 may rely upon the record in case No. 5775 for the documents so eliminated from case No. 5781, and that the two cases be consolidated for a hearing by this Court.

HENRY B. MORROW,
WILTON H. WALLACE,
Attorneys for the Appellant.
THOMAS E. RHODES,
Special Assistant to the Attorney General,
Attorney for the Appellees.

83 [Endorsed:] No. 5781. Stettiner Chamotte Fabrik Aktiengesellschaft, Appellant, vs. Howard Sutherland, &c., et al. Stipulation as to printing record and to consolidate with No. 5775. Court of Appeals, District of Columbia. Filed Sep. 19, 1932. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5781. Stettiner Chamotte Fabrik Aktiengesellschaft, appellant, vs. Howard Sutherland, as Alien Property Custodian of the United States, and Walter O. Woods, as Treasurer of the United States. Court of Appeals, District of Columbia. Filed Sep. 15, 1932. Henry W. Hodges, Clerk.

JAN 1 4 1933

IN THE

CLERK

Court of Appeals, District of Columbia

JANUARY TERM, 1933.

No. 5781.

STETTINER CHAMOTTE FABRIK AKTIENGESELLSCHAFT,
Appellant,

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN
OF THE UNITED STATES, AND WALTER O. WOODS, AS
TREASURER OF THE UNITED STATES, *Appellees.*

BRIEF FOR APPELLANT.

HENRY B. MORROW,
WILTON H. WALLACE,
Attorneys for Appellant.

COLLADAY, MCGARRAGHY, COLLADAY & WALLACE,
Of Counsel.

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IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1933.

No. 5781.

STETTINER CHAMOTTE FABRIK AKTIENGESELLSCHAFT,
Appellant,

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN
OF THE UNITED STATES, AND WALTER O. WOODS, AS
TREASURER OF THE UNITED STATES, *Appellees.*

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This appeal involves the claims of two German corporations, Stettiner Chamotte Fabrik Aktiengesellschaft and Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft, for the balance of a fund held in trust by the Alien Property Custodian. For convenience Stettiner Chamotte Fabrik Aktiengesellschaft will

hereinafter be called Stettiner and Deutsche Ton-& Steinzeug-Werke Aktiengesellschaft will be called Deutsche Ton.

This case was originated by a bill in equity filed by the Appellant in the Supreme Court of the District of Columbia against the Appellees on March 21, 1930, to require the Appellees to pay to the Appellant the balance of a fund remaining in Trust No. 32429 in the office of the Alien Property Custodian to the credit of Deutsche Ton with the additions and accretions thereto and income therefrom less the sum required to be retained by the provisions of subsection (m) of Section 9 of the Trading with the Enemy Act as amended (40 Stat. 411). This suit was instituted under Section 9 of the Trading with the Enemy Act as amended (40 Stat. 411).

The Appellees on June 13, 1930, filed their answer to the bill of complaint and among other things contended that the provisions of said Section 9 gave the Supreme Court of the District of Columbia no jurisdiction of the subject matter of the bill of complaint and prayed that they be dismissed with their costs. On November 17, 1930, Mr. Justice Cox in the Supreme Court of the District of Columbia entered an order overruling without prejudice the motion of the Appellees to dismiss the bill of complaint.

Deutsche Ton filed a bill of complaint against these Appellees in the Supreme Court of the District of Columbia on November 22, 1929, to require them to pay over to that complainant the balance of the fund in question with the additions and accretions thereto and the income therefrom less the sum required to be retained by the provisions of subsection (m) of Sec-

tion 9 of the Trading with the Enemy Act as amended and also prayed for an accounting.

The suits of Stettiner and Deutsche Ton were consolidated for trial and argument in the Supreme Court of the District of Columbia and the cases were heard by Mr. Justice O'Donoghue and a decree in each case was entered on June 24, 1932, and the trial justice also on that date signed Findings of Fact and Conclusions of Law in each of the cases. The decree of the trial justice in the Stettiner case ordered that the plaintiff was entitled to recover nothing and dismissed the bill of complaint, with costs. The decree of the trial justice in the Deutsche Ton case ordered that the plaintiff was entitled to have released and paid over to it the balance of the fund in question with the additions and accretions thereto and the income therefrom less the sum required to be retained by the provisions of said subsection (m) and less any deductions authorized to be made by the defendants or either of them in accordance with the said Trading with the Enemy Act as amended and ordered that the defendants forthwith pay over to Deutsche Ton the fund found to be due Deutsche Ton.

From the said decrees of the trial justice appeals have been prosecuted to this Honorable Court. These appeals have been consolidated by stipulation of counsel filed on September 19, 1932.

The facts in both cases in the Trial Court were agreed upon by counsel for Stettiner, Deutsche Ton and for the Alien Property Custodian and the Treasurer of the United States. An Agreed Statement of Facts signed by counsel for all of the parties was filed in the Supreme Court of the District of Columbia on

June 3, 1932. The Agreed Statement of Facts is set forth in the record in the Deutsche Ton case at pages 19 through 62 inclusive. For the convenience of the Court these facts, (not including exhibits), are summarized herewith:

Didier-March Company was a corporation organized under the laws of the State of New Jersey in 1906 and continued its corporate existence until its dissolution. Its outstanding capital stock from and after December 31, 1916, to its dissolution was \$1,150,000 made up of 7,500 shares of preferred stock of the par value of \$100 each, and 5,000 shares of common stock of the par value of \$80 each. Until the year 1912 its stock was equally owned by petitioners Deutsche Ton and Stettiner. During the year 1912 Stettiner acquired from Deutsche Ton all of the stock previously held by it in Didier-March Company thereby becoming the owner of all of the issued and outstanding capital stock of the Didier-March Company, and thereafter continued to hold and own said stock until the seizure thereof by the Alien Property Custodian.

On or about the 16th day of May, 1912, Didier-March Company entered into a contract with Deutsche Ton wherein and whereby Didier-March Company undertook and agreed to transfer and convey to a New Jersey corporation called German American Stoneware Works a portion of its property and business and agreed to make certain payments to Deutsche Ton under conditions and contingencies stated in said contract. A true and correct copy of said contract is annexed to the answer of the Alien Property Custodian and the Treasurer of the United States in each of the above-entitled cases, and is incorporated as a part hereof by reference.

On or about the 27th day of March, 1918, the then acting Alien Property Custodian under and pursuant to the power and authority vested in him as such official, after investigation, duly determined that Stettiner was an "enemy", and that it was the owner of 5,000 shares of the common stock and 7,500 shares of the preferred stock of said Didier-March Company consisting and being the entire shares of stock of that corporation issued and outstanding, and by demand duly served upon said corporation on April 10, 1918, seized all of said shares of stock and all the right, title and interest of said enemy in and to such shares. Thereafter, the Alien Property Custodian caused all of the said shares of stock to be transferred on the books and records of said corporation to him and new certificates to be issued therefor in his name as Custodian, with the exception of 5 shares of the common stock, which 5 shares, by direction of the Alien Property Custodian, were from time to time transferred to and issued in the name of persons acting as directors of said corporation.

At a meeting of the Board of Directors of the said Didier-March Company duly held and convened on the 15th day of April, 1918, at which there were present Messrs. F. C. McLaughlin, George C. Balz, and J. J. Farrell constituting the whole Board of Directors and being the directors qualified and holding office at and prior to the seizure of the shares of stock of said corporation by the Alien Property Custodian as hereinabove stated, the following proceedings were had, to wit:

Mr. Farrell resigned and Mr. C. S. Fairchild, designated by the Alien Property Custodian, was elected a director in the place of Mr. Farrell, and he being pres-

ent duly qualified as a director. Thereafter and at this same meeting, the number of the Board of Directors was increased from three to five, and Messrs. G. H. Flinn and J. D. Brodhead, both designated by the Alien Property Custodian, were elected and duly qualified as directors.

Thereafter, at a meeting of the Board of Directors of said corporation duly held on the 28th day of May, 1918, Mr. McLaughlin resigned and Mr. E. M. McIlvain, designated by the Alien Property Custodian, was elected in his place and duly qualified.

Mr. Balz continued as a director of the corporation until a stockholders' meeting on March 12, 1919, at which time five persons designated by the Alien Property Custodian were elected directors.

On November 22, 1918, the following resolution was passed by the aforesaid directors of the Didier-March Company:

“Mr. Balz reported that he had received a letter from the company's counsel calling attention to the discovery of an obligation of the Didier-March Company to the Deutsche Ton and Steinzeug Werke requiring the former to pay to the latter for a period of ten years after January 1, 1912, an amount equal to 15 per cent of the profits of the Didier-March Company's annual business remaining after deducting an amount equal to 5 per cent of the capital actually invested in the Didier-March Company's business, and that said discovery required the filing of a supplemental report to the Alien Property Custodian by this company. Upon motion counsel was instructed to file said supplemental report.”

On December 2, 1918, the said Didier-March Company, pursuant to the requirements of the Trading

with the Enemy Act, and the aforesaid resolution reported to the Alien Property Custodian the contract of May 16, 1912, between Deutsche Ton and Didier-March hereinabove mentioned, and thereafter on or about December 23, 1918, the Alien Property Custodian determined after investigation that Deutsche Ton was an "enemy" and that it had a certain right, title and interest in and to the said contract dated May 16, 1912, and by demand duly served on said Didier-March Company, on the 15th day of January, 1919, the Alien Property Custodian duly seized every right, title and interest of said Deutsche Ton in and to said contract including every power and authority thereover which might or could be exercised by it.

No profits were earned by Didier-March Company prior to January 1, 1917, and no payments under said contract have ever been made to Deutsche Ton by Didier-March Company.

The Baltimore Audit Company made a report to the Didier-March Company under date of January 23, 1918, showing a computation of net income and capital accounts as follows:

Capital stock of Didier-March Com-	
pany, December 31, 1916 and 1917	\$1,150,000.00
Surplus deficit, December 31, 1916	\$253,157.36
Net earnings for 1917	\$19,837.79

Under date of December 19, 1918, Whittlesey and Wythes, Certified Public Accountants of New York City, made an audit report of the books and accounts of the Didier-March Company to the Alien Property Custodian, in which audit report, among other things (on page 14), the following statement appeared:

“Deutsche Ton and Steinzeugwerke Aktiengesellschaft:

“The amount of \$22,810.46 shown on schedule 6 as owing to this enemy represents the sum of their participation in the profits of the Didier-March Company for the years 1917 and 1918 (to September 30).

“This liability was set up after investigation and consultation with counsel of the company. Mr. Frank L. Crocker is of the opinion that the contract (in which provision as to the above participation appears) was not abrogated by the declaration of war in 1917. Copy of the contract appears on schedule 16.

“No profits accrued on this contract previous to 1917 for the reason that profits were not earned by the Didier-March Company.”

On May 16, 1919, a further resolution was passed by the directors of Didier-March Company as follows:

“The question of the indebtedness of this corporation to Deutsche Ton and Steinzeug Werke A. G. of Charlottenburg, Germany, under the contract providing for the payment by it of 15 per cent of the net profits of the business after paying 5 per cent interest on the invested capital of the corporation, was considered, and on advice of counsel that the fair construction of the contract was that invested capital meant the money which had been invested in the Didier-March Company and not the depreciated capital as computed as the basis of the excess profits tax, the matter was referred to Mr. Crocker to take up with the accountants and prepare a new statement of the amount due and report the same to the proper authority.”

Said Mr. Crocker was then Secretary and Counsel of said Didier-March Company.

Exhibit "A" (Deutsche Ton R. 31) is a photostat copy of a letter dated June 5, 1919, bearing letterhead of Whittlesey, Wythes and Wilson, Certified Public Accountants, 30 Church Street, New York City, addressed to Frank L. Crocker, Esquire, 5 Nassau Street, New York City, appearing in the official files of the office of the Alien Property Custodian and which was received by the office of the Alien Property Custodian on December 26, 1919, and which was sent to the office of the Alien Property Custodian by Mr. Crocker or the Didier-March Company at the request of the office of the Alien Property Custodian.

Under date of February 4, 1919, A. Mitchell Palmer, then Alien Property Custodian, issued an Order of Sale of the entire capital stock of Didier-March Company and other property and attached to the order a prospectus giving the history of the Didier-March Company, together with a statement, a copy of which is designated Exhibit "B". (Deutsche Ton R. 35) Said capital stock was not sold by the Alien Property Custodian, but pursuant to a resolution passed by the Board of Directors on May 27, 1919, the affairs of the company were liquidated.

On December 4, 1919, the directors of Didier-March Company passed the following resolution:

"The Deutsche Ton claim as fixed by the accountants was reviewed and ordered paid in Liberty Bonds at their face value and the matter referred to Mr. Crocker to take up with their Washington office."

Under date of February 24, 1920, Whittlesey, Wythes and Wilson, Certified Public Accountants, 30 Church Street, New York City, rendered a report to

the Alien Property Custodian, containing among other things the following statement:

“Deutsche-Ton Steinzeugwerke Aktiengesellschaft”:

“The amount of \$23,369.88 at December 31, 1919, shown on schedule 9 as owing to this enemy represents the accrual of their participation in the earnings of the Didier-March Company for the years 1917, 1918 and 1919 as follows:

1917	\$10,180.78
1918	11,848.38
1919	1,340.72
Total	\$23,369.88

“A copy of the contract on the basis of which the above mentioned accruals were made appears on schedule 16 of the report of Whittlesey and Wythes dated December 19, 1918, and comments thereon are to be found on page 14 of said report. (Said comments are set forth in paragraph 11 hereinabove.)

“At a meeting held December 4, 1919, the directors of the Didier-March Company ordered the payment to the Alien Property Custodian of this claim, as fixed by the accountants in Liberty Bonds at face value.”

The amount of \$23,369.88 set forth above was arrived at as follows:

1917	
Capital stock of Didier-March Co.	\$1,150,000.00
Less deficit 12-31-16	576,772.82
Net capital 12-31-16	573,227.18

Net earnings for 1917	96,533.21
Less 5% on net capital above	28,661.36
Balance of earnings	67,871.85
15% of balance of earnings	10,180.78
1918	
Capital stock of Didier-March Co.	\$1,150,000.00
Less deficit 12-31-17	494,239.18
Net capital 12-31-17	655,760.82
Net earnings for 1918	111,777.26
Less 5% on net capital above	32,788.04
Balance of earnings	78,989.22
15% of balance of earnings	11,848.38
1919	
Capital stock of Didier-March Co.	\$1,150,000.00
Less deficit 12-31-18	403,075.68
Net capital 12-31-18	746,924.32
Net earnings for 1919	46,284.35
Less 5% on net capital above	37,346.22
Balance of earnings	8,938.13
15% of balance of earnings	1,340.72

The balance sheets and the net income of the company as determined by the same accountants are marked Exhibit "C" (Deutsche Ton, R. 37).

A copy of said report of February 24, 1920, was transmitted by the custodian to the above-named Mr. Crocker on March 1, 1920, Exhibit D (Deutsche Ton, R. 38). On March 2, 1920, the said Mr. Crocker returned the copy of said report which had been sent him,

to Mr. George P. Wagner, Mr. Wagner being an attorney in the office of the Alien Property Custodian. A photostat copy of the letter from Mr. Crocker to Mr. Wagner is marked Exhibit "E" (Deutsche Ton, R. 38).

On March 2, 1920, the Alien Property Custodian addressed a letter to Messrs. Whittlesey, Wythes & Wilson acknowledging receipt of said report, a photostat copy of the said letter of acknowledgment marked Exhibit "E-1" (Deutsche Ton, R. 39).

Proceedings in dissolution of Didier-March Company were held and carried out through the Chancery Court of the State of New Jersey, the dissolution having been completed in the year 1926. The Alien Property Custodian when he seized the stock of Didier-March Company as aforesaid, set up an account designated as Trust No. 11866 in the name of Stettiner, to which account or trust there was to be credited all money and property seized by him as the property of Stettiner. Likewise when the Alien Property Custodian seized all the right, title and interest of Deutsche Ton in and to the contract dated May 16, 1912, and all the rights, privileges and benefits granted to or conferred upon Deutsche Ton by said agreement as hereinabove stated, he then set up an account designated as Trust No. 32429 in the name of Deutsche Ton, to which account or trust there was to be credited, all money and property seized by him as the property of Deutsche Ton.

United States Liberty Loan Bonds and cash received by the Alien Property Custodian in the month of March, 1921, from the Didier-March Company and representing or being a distribution of a portion of the net proceeds of the liquidation of said Didier-

March Company as aforesaid, were credited by the Alien Property Custodian wholly to the account Trust No. 11866 in the name of Stettiner, and no part thereof was credited to the account Trust No. 32429 in the name of Deutsche Ton; and the Liberty Bonds and cash subsequently so received by the Alien Property Custodian from Didier-March Company were likewise wholly credited when received to Trust No. 11866 in the name of Stettiner.

No part of any Liberty Bonds or money or other property received by the Alien Property Custodian from Didier-March Company was or has been credited by the Alien Property Custodian to Trust No. 32429 in the name of Deutsche Ton except the Liberty Bonds and cash transferred by the Alien Property Custodian from Trust No. 11866 in the name of Stettiner to Trust No. 32429 in the name of Deutsche Ton, as is stated hereinafter.

Pursuant to a memorandum of February 29, 1924, made by Chief of Corporation Management Division, and approved by the Custodian (Exhibit I, Deutsche Ton, R. 54), on March 8, 1924, there was transferred by the Alien Property Custodian from Trust No. 11866 in favor of Stettiner to Trust No. 32429 in favor of Deutsche Ton the sum of \$27,279.88. The aforesaid transfer was made without any notice to Stettiner.

Pursuant to the Settlement of War Claims Act, March 10, 1928, Deutsche Ton filed a claim with the Alien Property Custodian for the balance remaining in Trust No. 32429 in its favor, consenting to the retention by the Custodian of 20 per cent thereof as required by said Act, the claim being given No. 770. On February 19, 1929, Stettiner filed a similar claim, its claim being given No. 2589. Both claims are still

pending and undetermined by the Alien Property Custodian.

This appeal is prosecuted for errors of law committed by the trial court in the conclusions of law found by him. (Stettiner R. 17.)

ASSIGNMENT OF ERRORS.

1. The Court erred in entering a decree dismissing the Bill of Complaint.

2. The Court erred in not entering a decree in favor of the plaintiff.

3. The Court erred in not finding all the facts as stipulated by and between counsel in the Agreed Statement of Facts filed June 3, 1932.

4. The Court erred in finding as a conclusion of law that by virtue of the seizure by the Alien Property Custodian of all of the shares of the capital stock of Didier-March Company, he became vested with and authorized to exercise all of the rights of ownership appurtenant to said shares including the power to exercise any and all voting rights; and that by virtue of the seizure by the said Custodian of all of the rights, privileges and benefits granted to or conferred upon Deutsche Ton by the agreement dated May 16, 1912, between said Deutsche Ton and said Didier-March Company, he became vested with all of the rights and powers of Deutsche Ton under and in respect of said contract, including the power, without notice to or consultation with either Stettiner or said Deutsche Ton, to negotiate with and agree with said Didier-March Company upon the amount accruing under said contract in favor of said Deutsche Ton, and to collect and receive from said Deutsche Ton

any and all sums payable by said Didier-March Company under said contract.

5. The Court erred in finding as a conclusion of law that neither the seizure by the Alien Property Custodian of all of the shares of the capital stock of Didier-March Company, nor the seizure by the said Custodian of all of the rights, privileges and benefits granted to or conferred upon Deutsche Ton by the agreement of May 16, 1912, nor the designation by the said Custodian of persons to serve as directors of said Didier-March Company effected or resulted in change in the corporate existence or identity of said Didier-March Company as a New Jersey corporation and that said Didier-March Company continued to exist, as, and to be managed as a New Jersey corporation until its dissolution.

6. The Court erred in finding as a conclusion of law that Didier-March Company, acting through its Board of Directors and its secretary and counsel, fixed and determined upon the amount of \$23,369.88 as the amount accruing in favor of Deutsche Ton under the contract of May 16, 1912, for the years 1917, 1918 and 1919 and directed that this sum be paid to the said Custodian in Liberty Bonds at their face value; and that the said Custodian duly accepted and agreed to this; and that it became and was the duty of the said Custodian to credit to trust No. 32429 in the name of said Deutsche Ton out of the proceeds of liquidation of said Didier-March Company received by the said Custodian, Liberty Loan Bonds of the face value or amount of \$23,000 and cash in the amount of \$369.88, together with any and all income therefrom and accretions and additions thereto.

7. The Court erred in finding as a conclusion of law that the transfer as made by the Alien Property Custodian on or about March 8, 1924, from trust No. 11866 in the name of Stettiner to trust No. 32429 in the name of Deutsche Ton of Second Liberty Bonds of the face value of \$23,000, together with the interest that had accrued thereon from May 15, 1920, to November 15, 1923, and cash in the sum of \$369.88, was duly and properly made by him.

8. The Court erred in finding as a conclusion of law that Deutsche Ton is entitled to have released and paid over to it the balance of the money and property now held by the Alien Property Custodian and/or Treasurer of the United States in a certain trust among the records of the office of the said Custodian designated as No. 32429 in the name of said Deutsche Ton and the additions and accretions thereto less the sum required to be retained by the provisions of subsection (m) of Section 9 of the Trading with the Enemy Act and less all lawful deductions made by the said Custodian and the said Treasurer of the United States or either of them from said fund.

9. The Court erred in finding as a conclusion of law that Stettiner did not own the sum of \$23,369.88, fixed and determined by Didier-March Company and the Alien Property Custodian as the amount due by the said Didier-March Company to the Alien Property Custodian under the said contract of May 16, 1912, or any part thereof, at the time said \$23,369.88 was seized by, or paid, conveyed, transferred, assigned and delivered to the said Custodian.

10. The Court erred in finding as a conclusion of law that Stettiner is not entitled to recover said \$23,369.88 or any part thereof, or any interest there-

on, and that said Stettiner is not entitled to have released and paid over to it any of the money and/or other property held by the Alien Property Custodian and/or the Treasurer of the United States in trust No. 32429 in the name of Deutsche Ton & Steinzeug-Werke A. G.

SUMMARY OF ARGUMENT.

I.

THE DIRECTORS OF DIDIER-MARCH COMPANY DID NOT ON DECEMBER 4, 1919, ORDER OR APPROVE PAYMENT TO DEUTSCHE TON OF \$23,369.88.

II.

IF, CONTRARY TO PETITIONER'S POSITION, SAID PAYMENT OF \$23,369.88 WAS APPROVED, THEN SAID APPROVAL IS NOT CONCLUSIVE, BUT IS SUBJECT TO REVIEW IN THIS COURT.

III.

THE AGGREGATE AMOUNT DUE DEUTSCHE TON WAS NOT MORE THAN \$3,031.68.

ARGUMENT.**I.****The Directors of Didier-March Company Did Not on December 4, 1919, Order or Approve Payment to Deutsche Ton of \$23,369.88.**

The trial court (Stettiner R. 17) concluded that Didier-March Company, acting through its Board of Directors, fixed and determined upon the sum of \$23,369.88 as the amount due Deutsche Ton under the contract of May 16, 1912. The record in this case does not support said conclusion.

The finding of the lower court was based upon the minutes of the meeting of the Board of Directors of Didier-March Company held December 4, 1919 (Deutsche Ton R. 24, 25). In order fully to understand the action taken by said Board of Directors on that date, it is necessary to consider the events leading up to said action. The following chronology will be helpful:

12-19-18—Whittlesey and Wythes, Certified Public Accountants, rendered a report to the Alien Property Custodian showing that the amount due Deutsche Ton under said contract of May 16, 1912, for the years 1917 and 1918 (to September 30) was \$22,810.46 (Deutsche Ton R. 23).

5-16-19—The Board of Directors of Didier-March Company considered the foregoing report and: "on advice of counsel that the fair construction of the contract was that invested capital meant the money which had been in-

vested in the Didier-March Company and not the depreciated capital as computed as the basis of the excess profits tax, the matter was referred to Mr. Crocker to take up with the accountants and prepare a new statement of the amount due and report the same to the proper authority." (Deutsche Ton R. 24).

6-5-19—Whittlesey, Wythes and Wilson, Certified Public Accountants, submitted to Mr. Crocker a report showing that the actual capital invested was \$1,831,321.83 (Deutsche Ton R. 24, 34).

12-4-19—The Directors of the Didier-March Company passed the following resolution:

"The Deutsche Ton claim as fixed by the accountants was reviewed and order—paid in Liberty Bonds at their face value and the matter referred to Mr. Crocker to take up with their Washington office" (Deutsche Ton R. 25).

2-24-20—Whittlesey, Wythes and Wilson rendered a report to the Alien Property Custodian setting forth the amount due Deutsche Ton under said contract to be \$23,369.88 (Deutsche Ton R. 25).

The foregoing chronology makes it perfectly clear that the accountants' report of December 19, 1918, used "depreciated capital" for the purpose of determining the amount, if any, due Deutsche Ton under the con-

tract. The accountants did not use the "actual capital invested", as required by the contract. Realizing this, said Directors on May 16, 1919, definitely and positively, upon the advice of counsel, disapproved the method followed and the result obtained, by said accountants and gave specific instructions that said accountants not use "depreciated capital" as they had theretofore done; and a new statement, to be filed with Mr. Crocker, was requested from said accountants.

Said new statement from the accountants was duly prepared, and submitted to Mr. Crocker on June 5, 1919, pursuant to the foregoing resolution of the Board of Directors. With the amount of the actual capital invested thus fixed, the determination of the amount due Deutsche Ton involved a mere arithmetical computation.

With the new statement of June 5, 1919, before them, the same having been prepared at the request of the Board of Directors, that body on December 4, 1919, adopted the resolution hereinabove set forth. The approval given in said resolution to the Deutsche Ton claim "as fixed by the accountants" can have reference only to the figures and the method set forth in the accountants' report of June 5, 1919. As a matter of fact, the sum of \$23,369.88, which the lower court finds to have been approved by the Board of Directors, was not fixed or determined until February 24, 1920, which date falls *after* the action of the Board of Directors upon which the trial court based its ruling. In their computation of February 24, 1920, fixing the amount of \$23,369.88 as the sum due Deutsche Ton, the accountants followed the identical method which had been definitely disapproved on May 16, 1919, by the Board of Directors of Didier-March Company. In-

stead of using the actual capital invested of \$1,831,321.83, the accountants used a net capital," so-called, of from \$573,000 plus to \$746,000 plus (Deutsche Ton R. 26). This method was manifestly in error, having been specifically rejected by the Didier-March Company.

At this point it is interesting to note that all five Directors of Didier-March Company were on December 4, 1919, and since March 12 of that year had been nominees of the Alien Property Custodian (Deutsche Ton R. 22).

The conclusion of the trial court that the Didier-March Company fixed and determined upon the amount of \$23,369.88, which sum was due only if the disapproved method of determination be followed, is not supported by any fact in the record. Said conclusion should be reversed.

II.

If, Contrary to Petitioner's Position, Said Payment of \$23,369.88 Was Approved, Then Said Approval is Not Conclusive, But is Subject to Review in This Court.

If this Honorable Court shall find as a matter of fact on the record that the directors of Didier-March Company approved of the transfer of the fund in question from a Trust in favor of Stettiner to a Trust in favor of Deutsche Ton, we necessarily are led to a consideration of the question whether the resolution of said directors of December 4, 1919, is binding in this suit so as to establish that Deutsche Ton is entitled to said fund and that Stettiner is not so entitled.

We submit that the answer to the above question is plainly in the negative.

The Trial Court in its Conclusions of Law, paragraph 3 (Stettiner R. 17), held that Didier-March Company through its Board of Directors and its Secretary and Counsel, fixed and determined the amount owing Deutsche Ton under the contract of May 16, 1912, for the years 1917, 1918 and 1919 and directed that this sum be paid to the Alien Property Custodian in Liberty Bonds at their face value; and that the Alien Property Custodian duly accepted and agreed to this; and that it became and was the duty of the Alien Property Custodian to transfer the fund in question from the Trust in favor of Stettiner to the Trust in favor of Deutsche Ton.

With the above conclusion of law of the Trial Court we take issue.

Section 9 (a) of the Trading with the Enemy Act as amended (40 Stat. 411) provides that a claimant, who is not an enemy or an ally of an enemy, may institute a suit in equity against the Alien Property Custodian or the Treasurer of the United States, as the case may be, "to establish the interest, right, title or debt so claimed." This provision of the statute is extended by Section 9 (b) and paragraphs (12) and (13) thereof and also by section 9 (c) which provide that if the President shall determine that the owner at the time of seizure was a German corporation and had complied with subsection (m) of the statute, said corporation "may institute suit in equity to recover such money or other property" as provided in subsection (a) "and with like effect."

Thus it is seen that the statute clearly gives Stettiner a German corporation and a claimant, the right to establish its claim by a suit in equity.

The seizure of the property by the Alien Property Custodian establishes his right to possession of the property but does not determine the ownership thereof.

The ownership of the property seized by the Alien Property Custodian, so long as it remains in the possession of the Alien Property Custodian, may be determined by the courts in a suit in equity by a claimant and no action by the Alien Property Custodian or his agents can deprive a claimant of this right.

In the case of *Stoehr v. Wallace*, 269 Fed. 827, at page 834, Judge Learned Hand says:

“It is quite true that under section 12 as amended his powers are extended to include the general power to sell, but under section 9 any claimant friend may file a bill such as this, and either the bill automatically stays the sale, or at least the court may stay it in a proper case, and such a suit section 9 makes the sole remedy of claimants. Thus it is apparent what the scheme of the act was. The reduction to possession of enemy property should be absolute, final and incontestable; it was to proceed by ex parte investigation and without right of review; it should include all property that the Alien Property Custodian decided to have enemy character. But it adjudicated nothing and its effect upon any right but that of possession was nil. *In a suit under section 9 the investigation and decision are irrelevant.*” (Italics supplied.)

This case was appealed to the Supreme Court of the United States (*Stoehr v. Wallace*, 255 U. S. 239), which approved the foregoing and held, pp. 245, 246:

“That Congress in time of war may authorize and provide for the seizure and sequestration

through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. *Centrol Union Trust Co. v. Garvan, supra*. There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious."

While the above case deals with the claim of a person who is not an alien enemy, the same rule undoubtedly obtains with respect to the claims of alien enemies authorized under later amendments to the Trading with Enemy Act.

In the case of *In re Sutherland*, 23 Fed. (2d) 595, it was held that the Alien Property Custodian's determination that stock is owned by an alien enemy is sufficient to require a corporation to cancel such stock and issue certificates in lieu thereof to the Alien Property Custodian, whether the decision is right or wrong;

all rights and equities which may have existed in favor of the corporation remaining open for future proceedings under section 9 of the Trading with the Enemy Act.

It is thus seen that the right of Stettiner to sue and have the ownership of the fund in question determined by the courts is incontestable.

When the Custodian seized the stock of Didier-March Company, which up to that time was owned by Stettiner, he did so under section 7 (c) of the Trading with the Enemy Act. By so seizing said stock the Custodian vested in himself the rights of a stockholder, *Sutherland v. Selling*, 16 Fed. (2d) 865.

It was held in the case of *Munich Reinsurance Co. v. First Reinsurance Co.*, 300 Fed. 345, that an alien corporation had no further interest in the stock of a domestic corporation after its seizure by the Alien Property Custodian.

The Supreme Court of the United States in the case of *Great Northern Railway v. Sutherland*, 273 U. S. 182, held that a demand by the Alien Property Custodian for the transfer of stock to him was effective as seizure of the stock, the Court saying through Mr. Justice Brandeis at page 191:

“The term seizure as used in this connection connotes merely the taking of possession. Hence there was no occasion to define the extent of the enemy’s ownership. The demand operated as a symbolic seizure.”

In *33 Opinions of Attorneys General* 469 in an opinion addressed to The Secretary of the Navy, Attorney General Palmer construed Section 12 of the Trading with the Enemy Act. At page 471 he said:

“The section clearly gives him the right to vote stock which is thus transferred or delivered to him and to elect directors by means of such stock control.”

The seizure of the stock vested the Alien Property Custodian with all the rights of Stettiner therein and divested Stettiner of any rights therein. The Alien Property Custodian had the right to vote such stock and elect such directors. The evidence shows that the Alien Property Custodian after the seizure of the stock did designate and elect directors of the Didier-March Company. He obtained control of the directorate on April 15, 1918. (Deutsche Ton R. 21.) At the date of the resolution of the directors of December 4, 1919, the Alien Property Custodian was the sole owner of the stock of Didier-March Company; and its directors, all of them, were persons designated by the Alien Property Custodian and were his agents. (Deutsche Ton R. 21, 22.) The resolution is not binding on Stettiner because at the date of its adoption Stettiner had been completely divested of any ownership of such stock and of any interest in the corporation. The only effect the resolution could possibly have would be a determination by the Alien Property Custodian himself that such an amount was due.

But such a determination by the Alien Property Custodian through his directors is not binding upon Stettiner in this action. If it were, it would deprive Stettiner of the right to sue to establish its interest in the fund held by the Alien Property Custodian as provided in Section 9 (a) of the Trading with the Enemy Act as amended.

The transfer of the fund from a trust in favor of Stettiner to a trust in favor of Deutsche Ton is not an

adjudication of the Stettiner claim or of the ownership of the fund.

The transfer of the fund from one trust to another is no more binding upon Stettiner than the original deposit of the fund in a trust in favor of Stettiner would be. Even if the Alien Property Custodian alleges, as he does in his answer filed in the Trial Court, that the original deposit of the fund in the trust in favor of Stettiner was "erroneous", it does not follow that such determination is correct any more than it would be if the Alien Property Custodian retransferred the said fund at this time back to the trust in favor of Stettiner.

Such transfers of funds to different accounts by the Alien Property Custodian are administrative matters within his office and nothing more.

The transfer of the fund in question was made without any notice to Stettiner and it had no opportunity before the Alien Property Custodian at that time to show its title to the fund and to dispute the claim of Deutsche Ton to the said fund. (Deutsche Ton R. 29.)

The allowance and payment of the claim of Deutsche Ton under the Winslow Act by the Alien Property Custodian does not operate as an adjudication of ownership of the fund which would be binding upon this court. All cases involving suit to establish the ownership of property or funds in the possession of the Alien Property Custodian are no doubt predicated on the denial of claims by the Alien Property Custodian. But such adverse action is not binding on the court in which suit is brought to establish ownership. No more can an act of the administrative forces of the Alien Property Custodian transferring a fund from one trust to another be binding upon the court in which a suit is brought to establish the ownership of such fund.

See also :

Columbia Brewing Company v. Miller, 281 Fed. 289.

Behn, Meyer & Co. v. Miller, 266 U. S. 457.

Commercial Trust Co. v. Miller, 262 U. S. 51.

Central Trust Co. v. Garvan, 254 U. S. 554.

The claim of Stettiner in the Trial Court was contested upon the basis of the following cases among others :

Mutzenbecher v. Ballard, 16 Fed. (2d) 173.

U. S. v. Chemical Foundation, 294 Fed. 300; 5 Fed. (2d) 191; 272 U. S. 1.

Junkers v. Chemical Foundation, 287 Fed. 597.

Munich Reinsurance Co. v. First Reinsurance Co., 300 Fed. 345; 6 Fed. (2d) 742.

All of these cases involve suits against citizens, individuals or corporations to whom the Alien Property Custodian had transferred the property seized from the alien enemy. Such is not the case here and the cases cited are not analogous to this case nor are they controlling. The rights of Stettiner and Detusche Ton to have the ownership of the fund adjudicated, are on a parity. The Trading with the Enemy Act gives both the right to litigate the determination of the Alien Property Custodian and to recover the amount due upon the establishment of the right, title and interest therein. That is all Stettiner is endeavoring to do in this case.

As long as funds or property are in the possession of the Alien Property Custodian, a claimant has the right to bring a suit in equity to establish the ownership thereof and this is a very different thing from

holding that where the Alien Property Custodian has transferred the property which was seized by him and it is no longer in his possession, there is no right of action against the person to whom such property was transferred.

In the Trial Court it was contended that because of the provisions of Section 12 of the Trading with the Enemy Act as amended, the transfer of the fund by the Alien Property Custodian can not be questioned in the courts. Section 12 among other things provides that "the Alien Property Custodian shall be vested with all of the powers of a common law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed * * * to him * * * and under such rules and regulations as the President shall prescribe, shall have the power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof * * *". Notwithstanding the provisions of Section 12 of the Act, we have been unable anywhere to find cases which have held that a claimant is denied the right to establish the title to the property in possession of the Alien Property Custodian by a suit in equity.

In fact, we submit that the contention made below with respect to this provision of the Act is in direct conflict with the opinion of Mr. Justice Holmes in the case of *Central Trust Co. v. Garvan*, 254 U. S. 554 at page 569, where he makes the following statement:

"To the conclusion that we reach it is objected that the Custodian gets a good deal more than

bare possession—that the property is to be conveyed to him, and that by the Act of March 28, 1918, c. 28, 40 Stat. 459, 460, enlarging Sec. 12, the Custodian ‘shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed,’ &c., to him, and is given the power to sell and manage the same as though he were absolute owner. *All this may be conceded if no claim is filed. But this act did not repeal Sec. 9, which is amended by the later Acts of July 11, 1919, c. 6, 41 Stat. 35, and of June 5, 1920, c. 241, 41 Stat. 977, and as we have said, provides for immediate claim and suit and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result.* The present proceeding gives nothing but the preliminary custody such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned and does no more.” (Italics supplied)

III.

The Aggregate Amount Due Deutsche Ton Was Not More Than \$3,031.68.

Since Didier-March Company never ordered or approved payment of said sum of \$23,369.88 and since the decision of the office of the Alien Property Custodian upon the ownership of that fund is not conclusive, we are brought to the question of determining the correct amount, if any, which is due Deutsche Ton under the contract of May 16, 1912. The determination of said amount involves a consideration of two factors, viz: (1) the actual capital invested, and (2) the earnings of Didier-March Company.

Actual Capital Invested:

The actual capital invested has been discussed under Point I, *supra*, and in the interest of brevity the argument will not be repeated here. The actual capital invested as found by the accountants amounts to \$1,181,321.83 (Deutsche Ton R. 34).

Earnings of Didier-March Company:

At various times, several audit reports have been prepared which reflect the income of the company for the three years here involved. A summary of the income shown by three of said reports is as follows:

Year	Report of Baltimore Audit Co. of 1-23-18 (Deutsche Ton R. 23)	Report of Whittlesey & Wythes of 2-4-19 (Deutsche Ton R. 24, 35)	Report of Whittlesey, Wythes & Wilson of 2-24-20 (Deutsche Ton R. 26, 37)
1917	\$19,837.79	\$15,097.05	\$96,533.21
1918		88,612.02 (9 mo.)	111,777.26
1919			46,284.35

The report of the Baltimore Audit Company was rendered to the Didier-March Company *prior* to the inception of the controversy involved in the instant proceeding. In fact said report was prepared *before* the Alien Property Custodian seized the stock of Didier-March Company then standing in the name of Stettiner.

The Whittlesey & Wythes report of February 4, 1919, was adopted and used by the Alien Property Custodian in a prospectus wherein the properties of Didier-March Company were publicly advertised for sale. By so doing, the Custodian declared to all the world that the income for 1917 of the company which was for sale, viz: Didier-March Company, was only \$15,097.05.

The Whittlesey, Wythes and Wilson report of February 24, 1920, was not submitted to the Didier-March Company but was rendered to the Alien Property Custodian (Deutsche Ton R. 25). That is the report which disregards entirely the instructions of the Board of Directors of the Didier-March Company and in so doing arrives at the figure of \$23,369.88, hereinabove referred to.

There is no controversy at this time regarding the income of the company for 1918 or 1919: the audit reports of the accountants dated February 4, 1919, and February 24, 1920, reflect substantially the same income for 1918; the record discloses only one figure representing income for 1919. There is a substantial controversy, however, regarding the correct income which Didier-March Company earned in 1917.

With reference to the income for 1917, it hardly seems probable that accountants could compute income on February 4, 1919, of only \$15,097.05 and that the same accountants one year later could determine income for the same year of \$96,533.21. It hardly seems possible for an error of over six hundred per cent to have been made on February 4, 1919. On the date last stated all the company's operations for 1917 had of course become closed transactions. The income of \$15,097.05 which was then determined approximates very closely the income of \$19,837.79 which had been determined by the accountants for the Didier-March Company as distinguished from the accountants employed by the Custodian. In weighing the probabilities, it seems fairly certain that the earnings of the company for 1917 amounted to something between \$15,097.05 and \$19,837.79. The appellant is willing to use the higher figure named in determining the amount, if any, due Deutsche Ton.

By adopting the sum of \$19,837.79, as the correct income for 1917 and by using the undisputed income for 1918 and 1919, we find that the amount due Deutsche Ton was substantially less than that found by the court below. The tabulation hereinafter set forth reflects the maximum amount which was due. In this connection it will be recalled that Didier-March Company was entitled under the contract of May 16, 1912, to earn 5 per cent upon the actual capital invested, before Deutsche Ton participated to the extent of 15 per cent in the balance of the earnings (Deutsche Ton R. 13). The tabulation follows:

Actual capital invested			\$1,831,321.83
5% thereof			91,566.09
	1917	1918	1919
Earnings	\$19,837.79	\$111,777.26	\$46,284.35
Less: 5%, supra	91,566.09	91,566.09	91,566.09
Earnings participated in by Deutsche Ton	NONE	\$20,211.17	NONE
15% thereof	NONE	\$3,031.68	NONE

It is thus apparent that the maximum participation of Deutsche Ton in the earnings of the Didier-March Company was \$3,031.68. The Alien Property Custodian has already paid to Deutsche Ton \$9,900.00, or more (Stettiner R. 16) representing a portion of the \$23,369.88 in controversy. Hence it is clear that Deutsche Ton has already been overpaid and that the entire balance of said sum of \$23,369.88 which is now on hand and held in trust No. 32429 is the property of Stettiner, the appellant herein.

CONCLUSION.

The decree of the lower court should be reversed and the Alien Property Custodian should be ordered to pay to Stettiner the entire balance now on hand of said \$23,369.88, with the additions and accretions thereto and the income therefrom, less the sum required to be retained under the provisions of sub-section (m) of section 9, now remaining in his hands in trust No. 32429.

Respectfully submitted,

(Signed) HENRY B. MORROW,

(Signed) WILTON H. WALLACE,

Attorneys for Appellant.

COLLADAY, MCGARRAGHY, COLLADAY & WALLACE,
Of Counsel.

